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Supreme Court, U.S.
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No. 02-1677

In the Supreme Court of the United States

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

NATHANIEL TRULL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONERS

HOWARD B. MYERS
Myers Associates, P.L.L.C.
240 Mechanic Street
Lebanon, NH 03766
(603) 448-1021

MICHAEL HOENIG
ROGER ARENTZEN
MIRIAM SKOLNIK
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005
(212) 344-5500

KENNETH S. GELLER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioners

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REPLY BRIEF FOR THE PETITIONERS

Respondents do not take issue with the key contentions in Volkswagen's petition. They do not deny that there exist significant and recurring circuit conflicts regarding the preservation of objections to inconsistent verdicts under Rule 49. See Pet. 13-23. They do not dispute that the court of appeals placed several of these conflicts directly at issue when it retroactively characterized the verdicts here as general verdicts – although even the respondents concede that they are "special verdicts" (Opp. 2) – and then decided on that basis, after the fact, that Volkswagen was obliged to point out the verdict inconsistencies *before* the jury was discharged. They acknowledge, moreover, that this Court has previously "granted certiorari to address conflicts in the Circuits as to the interpretation of procedural rules." *Id.* at 16.

Instead of challenging the merits of Volkswagen's representations, respondents contend that if it granted certiorari the Court would "never reach" the issues presented by the First Circuit's application of Rule 49. *Id.* at 7. Calling this case an instance of "garden-variety waiver" (*id.* at 11) – and peppering their brief with suggestions that Volkswagen has somehow behaved badly by appealing at all[1] – respondents contend that Volkswagen forfeited any objection to the inconsistent verdicts by acceding to the jury instructions, which presented alternative liability theories to the jury.

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[1] Respondents assert, for example, that this appeal "involves a pedestrian attempt by a litigant to play fast and loose with the federal court system" and that no appellate court "would come to the aid of such a litigant." Opp. 17. But it surely was reasonable for Volkswagen – which *prevailed* in the first trial and in the second trial secured a jury finding that the vehicle was *not defective* – to appeal a $10 million judgment based on a finding of negligence that plainly violated both the district court's instructions and clear New Hampshire substantive law.

Respondents' waiver argument does not undermine our showing that this case is worthy of the Court's review. First, although respondents scarcely acknowledge this fact, whether Volkswagen was barred by Rule 51 from challenging the jury's inconsistent findings is one of the two issues that Volkswagen has presented for review. This "waiver" issue is sufficiently important to merit a grant of certiorari by itself.

Second, although we do not purport to argue the merits fully herein, it should be clear even now that the First Circuit's finding of waiver under Rule 51 was deeply flawed. Respondents do not answer Volkswagen's contentions that the decision below ignores accepted trial practice, calls for defense objections that flout controlling state law, requires defendants to predict irrational and inexplicable jury decisions, and will create confusion and inefficiency in many diversity cases. Moreover, the jury instructions did not "invite" the verdict inconsistency; the jury's findings were inconsistent because the jury did not *follow* the instructions, which, consistent with New Hampshire law, precluded a finding for plaintiff on negligence in the absence of a defect. See *Greenland* v. *Ford Motor Co.*, 347 A.2d 159, 163 (N.H. 1975) (jury finding of negligence would not support verdict for plaintiff "where the jury found on the count in strict liability * * * that there was no defect in the car"). In sum, there is no reason to doubt that, if the Court grants certiorari, it will have occasion to address *both* issues presented by the petition, and that *both* issues merit review.

I. THE RULING THAT VOLKSWAGEN WAIVED ITS OBJECTIONS TO THE VERDICT INCONSISTENCY PRESENTS AN ISSUE THAT IS INDEPENDENTLY WORTHY OF REVIEW

The premise of the brief in opposition is that Volkswagen's supposed waiver counsels against the grant of certiorari. That premise is nonsensical, because the propriety of the court of

appeals' ruling that Volkswagen waived its objections to the inconsistent verdicts by failing to object to the jury instructions is one of the two issues that Volkswagen has presented for review. As we explain in the petition (at 23-29), that ruling is just as troubling as the court's ruling that Volkswagen failed to preserve its objections under Rule 49, and it conflicts with the approach of most other courts. The First Circuit's finding of waiver under Rule 51 thus is not an obstacle to review: it is a *reason to grant* review.

This was no "garden-variety" waiver determination. Opp. 11. The court of appeals has adopted a novel and troubling construction of Rule 51 that threatens to cut back substantially the ability of defendants to defend against inconsistent verdicts and to interfere with the federal courts' application of state law. The problem with the court's ruling is straightforward and stark. As respondents themselves emphasize, the Supreme Court of New Hampshire reiterated *in this very case* that "it is appropriate in a product liability case to submit both the theories of negligence and strict liability to the jury." *Id.* at 1-2 (citing *Trull* v. *Volkswagen of Am., Inc.*, 761 A.2d 477 (N.H. 2000)). The district court was obliged to apply this state law. Accordingly, the notion that Volkswagen waived important rights by agreeing to instructions asking the jury to "decide the issue of liability on both the theory of strict liability and the theory of negligence" (Pet. App. 6a) is patently nonsensical.

The decision below, moreover, is part of an emerging trend to deny defendants the right to challenge inconsistent verdicts by requiring them to predict and prevent such inconsistencies. Far from relying on egregious or manipulative conduct by Volkswagen, the First Circuit applied a general rule that it is necessary to object to the submission of overlapping theories in order to maintain a right to challenge inconsistent jury findings on those theories. The court adopted that rule in *Babcock* v. *General Motors Corp.*, 299 F.3d 60 (1st Cir. 2002) – a case

argued on the same day before the same panel that heard this case. In *Babcock*, the court concluded that the defendant could not challenge inconsistent verdicts on negligence and strict liability because it "fail[ed] to object properly to the jury instructions, which made it clear that the jury could return a verdict in [plaintiff's] favor if it found either negligence or a design defect." *Id.* at 64. *Babcock* – not any particular displeasure with Volkswagen's conduct – dictated the decision below. See Pet. App. 4a-9a (citing *Babcock*).

The Second Circuit has adopted the same rule. In *Jarvis* v. *Ford Motor Co.*, 283 F.3d 33 (2d Cir.), cert. denied, 123 S. Ct. 539 (2002), it held that a defendant may not object to inconsistent jury findings on negligence and strict liability unless, in advance, it specifically directs the court's attention to the similarities between those theories under state law and points out the consequent potential for inconsistencies raised by plaintiffs' reliance on both theories. *Id.* at 61. In *Jarvis*, the Second Circuit imposed this stringent waiver rule even though the defendant *had* objected to the submission of both theories to the jury. *Id.* at 60. Respondents acknowledge the "extreme similarity" between this case and *Jarvis* (Opp. 16 n.6), and contend that the denial of certiorari in *Jarvis* counsels against granting certiorari here. But the fact that the issue in *Jarvis* recurred so quickly here is proof positive that the issue is significant and merits immediate review.[2]

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[2] Respondents assert that the defendant in *Jarvis* had a "much stronger" case than Volkswagen because it had argued "that the case should not be submitted on both strict liability and negligence" while "Volkswagen made no such contention here." Opp. 16. But any such objection would have run afoul of the New Hampshire Supreme Court's pointed statement that it would be proper to charge both theories. *Trull*, 761 A.2d at 481. Accordingly, Volkswagen's decision to forgo such an objection was entirely proper and does not make this case a weaker vehicle than *Jarvis* for resolving the issues under Rule

These decisions are not only troubling in themselves: as the petition demonstrates, they bring the First and Second Circuits into conflict with several other circuits. Although respondents accuse Volkswagen of trying to "manufacture" a conflict, it is undeniable that the First and Second Circuits' punitive waiver rule represents a paradigm shift from the traditional means of assessing preservation of objections to verdict inconsistencies.

In scores of published decisions, courts of appeals have assessed the preservation of objections to verdict inconsistency by evaluating the objecting party's conduct *after* the verdict is returned.[3] See 9 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶¶ 49.11[b], 49.20[6][a] (3d ed. 1997) (collecting cases); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2510, 2513 at 216 n.19, 233 n.17 (1994 & Supp. 2003) (collecting cases). Academic commentators also have indicated that Rule 49 governs the preservation of these objections. See *id.* Despite the frequency with which the issue arises, no court other than

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51 that it presents. Furthermore, because *Jarvis* did not involve the issues of waiver under Rule 49 that Volkswagen's petition presents, it was in that respect a less attractive candidate for certiorari than this case.

[3] Moreover, as the petition explains (at 25), many courts have granted defendants judgment or a new trial because of inconsistent jury findings on alternative liability theories without suggesting that the defendant should have objected to the jury instructions. Respondents contend (Opp. 12 n.4) that the cases we cite did not present the issue of waiver under Rule 51. But it is implausible that the defendants in these cases all warned the court of the possible inconsistency and objected to the jury instructions and verdict forms on that basis. It is far more likely that the courts and the parties in these cases recognized the mainstream rule that objections to verdict inconsistency must be raised *after* the inconsistent verdict is returned.

the First and Second Circuits has treated Rule 51 as a hurdle to challenging inconsistencies in jury findings.

The Third Circuit has ruled *expressly* that the preservation of objections to verdict inconsistency depends on the objecting party's conduct after, not before, the verdict is returned. In *Loughman* v. *Consol-Pennsylvania Coal Co.*, 6 F.3d 88 (3d Cir. 1993), the defendants argued that the plaintiffs had "waived their right to complain" about allegedly inconsistent responses to jury interrogatories "by failing to object to the instructions or interrogatories" and "failing to suggest different or additional interrogatories." *Id.* at 103. The court categorically rejected the theory that Rule 51 was pertinent to its waiver determination, stating:

> To the extent that the defendants' argument is premised on the parties' failure to object to the instructions and interrogatories under [Rule] 51, we are unpersuaded. The question before us is not whether there was error in the instructions or in the interrogatories, but the legal effect of the jury's answers * * *. We agree, however, that if there is inconsistency in those answers, the failure of plaintiffs to object might create serious problems *under [Rule] 49.*

Ibid. (emphasis added). Respondents try desperately to distinguish this case on the ground that it involved an "incredibly complex proceeding." Opp. 12. But that played no role in the decision of the Third Circuit, which correctly deemed Rule 51 to be irrelevant to the issue before it.

Respondents also try to distinguish *Holloway* v. *McIntyre*, Nos. 86-1001, 86-1898, 1988 WL 7961 (6th Cir. Feb. 4, 1988), on the ground that "the jury failed to follow the court's instructions." Opp. 12. But the jury in *this* case plainly violated the court's instructions, which, as required by New Hampshire law (see *Greenland*, 347 A.3d at 163), made a

finding of liability on negligence dependent on the existence of a defect. See Pet. 27-28. Volkswagen cannot fairly be faulted for presuming that the jury would follow the instructions as given. As the Sixth Circuit stated in *Holloway*:

> At trial,* * * it is often difficult to anticipate an inconsistency before it occurs. We do not believe a party should be held to an onerous inconsistency merely because he was not prescient of upcoming events. At least "where the instructions do not foreshadow inconsistency, there is no basis for requiring contemporary objection."

1988 WL 7961, at *5 (quoting *Merchant* v. *Ruhle*, 740 F.2d 86, 91 (1st Cir. 1984)).

The division among the circuits regarding the defendant's obligation to object to the submission of alternative theories to the jury results in dramatic differences in the outcome of cases. In most courts of appeals, defendants have no obligation to alert trial judges that the plaintiff's decision to pursue multiple liability theories could lead to verdict inconsistencies. But in the First and Second Circuits, failure to do so deprives defendants of important rights – here, the right to enforce a clear state law rule that a finding in strict liability of "no defect" trumps any negligence finding. Such fundamental inter-circuit differences in federal trial practice should be promptly addressed and resolved by this Court.

II. VOLKSWAGEN DID NOT WAIVE ITS RIGHTS UNDER RULE 51

This case would be a strong candidate for review even if it presented *only* the issue of waiver under Rule 51. If certiorari is granted, however, there can be no serious doubt that the Court also will have the opportunity to resolve the significant issues under Rule 49 that the petition presents. By agreeing to

the instructions and the verdict form, Volkswagen plainly did not waive its right to object to the inconsistent verdicts.

Rule 51 provides that "no party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Pet. App. 48a. But Volkswagen did not forfeit any rights under Rule 51, because the jury instructions were substantially *correct* under New Hampshire law: they acknowledged plaintiffs' right to submit both strict liability and negligence to the jury, but also made it clear that Volkswagen could not be liable under either theory unless plaintiffs proved that a design defect had exacerbated their injuries.

Respondents contend that Volkswagen invited the error in the verdicts by proposing jury instructions stating "that the case was brought under theories of strict liability and negligence" and that the jury could "return a verdict for plaintiffs on either one or both of these theories.'" Opp. 4; see also *id.* at 14. Volkswagen did not "request" the instructions delivered at the second trial: the court used the same instructions that it had crafted and delivered in the first trial. In agreeing to that approach, Volkswagen did no more than acquiesce in the New Hampshire Supreme Court's ruling that "[a] strict liability action based upon a theory of defective design may be joined with an action * * * in negligence." *Trull*, 761 A.2d at 481.[5]

By accepting the district court's instructions, Volkswagen did not invite the jury to find negligence after concluding that the Vanagon was not "defectively designed." Pet. App. 34a. As the petition explains (at 4-5), the jury instructions made it clear

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[5] Volkswagen did submit, at the first trial, an instruction regarding the plaintiffs' reliance on two theories of liability, but only after plaintiffs indicated that they wished to charge both strict liability and negligence, as they were permitted to do under New Hampshire law.

that the plaintiffs could not recover under *either* of their liability theories unless they proved "that *the claimed design defect* was a substantial factor" in producing their injuries. Pet. App. 44a (emphasis added). Volkswagen's objection to the inconsistent verdicts thus was *not* based on a contention that the jury instructions were erroneous: the inconsistency arose because the jury *did not follow the instructions*. Volkswagen had no obligation to predict such an outcome.[6]

Respondents make much of the district court's instructions that the plaintiffs "need not prove both [strict liability and negligence] claims to recover" but "will be entitled to recover if they prove one or the other of these claims." Opp 5. These instructions are not objectionable either; because plaintiffs might have prevailed by proving *either* strict liability *or* negligence, the jury did not need to reach both theories. Nothing in the court's presentation of plaintiffs' liability theories suggests, however, that an express factual finding that there is *no design defect* can coexist with a finding that Volkswagen negligently designed a defective product.

Respondents also contend that Volkswagen waived its right to challenge the verdict by accepting the district court's verdict form. Taking its format from standard verdict forms used around the country (see PLAC Am. Br. 12), the special verdict form directed the jury to answer the negligence question after making, under the heading of strict liability, what amounted to a factual finding that the vehicle was not defective. The verdict form did not "invite" inconsistency any more than the jury

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[6] In a half-hearted effort to demonstrate that the verdicts were *consistent* with the instructions, respondents suggest that under New Hampshire law the term "defect" has subtly different meanings depending on whether negligence or strict liability is at issue. Opp. 15 n.5. Because *the instructions* reflect no such differences, however, that explanation cannot reconcile the jury's disparate findings.

instructions did: had the jury followed the instructions, a "no" answer to the design defect question would inevitably have been followed by a "no" answer to the negligence question.

Although the form might have been rewritten to avoid the possibility of inconsistency, there is no basis to conclude that *Volkswagen* waived its rights by failing to identify possible pitfalls in the form that was used. One can just as easily attribute any shortfalls in the form to *plaintiffs*' failure to protect their interests. Moreover, it was *plaintiffs*' decision to proceed on both negligence and strict liability – disregarding the Supreme Court of New Hampshire's express warning *to plaintiffs* that "while both counts are permitted, we do not recommend * * * that * * * both * * * be submitted to the jury because of the confusion that is created" (*Thibault* v. *Sears, Roebuck & Co.*, 395 A.2d 843, 849 (N.H. 1978)) – that created the possibility of inconsistency here. Volkswagen should not be forced to pay a $10 million price for plaintiffs' trial strategy.

In sum, because respondents' theory of waiver under Rule 51 is nonsensical, this case presents the Court with the opportunity to resolve the severe, important, and acknowledged conflicts under Rule 49 that are outlined in the petition. See Pet. 13-23. Volkswagen should not be saddled with a huge judgment that ignores a dispositive factual finding by the jury and offends New Hampshire's substantive law simply because the First Circuit decided – after the fact and in conflict with many other courts – that the special verdicts here were actually general verdicts and that Volkswagen's objections therefore should have come earlier. Instead, the Court should put to rest the confusion, injustice, and inefficiency that have plagued the use of special verdict forms in federal court, and have made Rule 49 a trap for the unwary, by reviewing the decision below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

HOWARD B. MYERS
Myers Associates, P.L.L.C.
240 Mechanic Streets
Lebanon, NH 03766
(603) 448-1021

MICHAEL HOENIG
ROGER ARENTZEN
MIRIAM SKOLNIK
Herzfeld & Rubin, P.C.
40 Wall Street
New York, NY 10005
(212) 344-5500

KENNETH S. GELLER
Counsel of Record
MIRIAM R. NEMETZ
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

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